BAN HIN LEE BANK BHD.

v.

LIM KAR BEE & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[ORIGINATING SUMMONS NO. 24-774-89]
29 FEBRUARY 1992

LAND LAW: *Order for sale of lands-issue - Whether statutory notice of demand in form 16D was in excess of the sum for which the chargor was liable - Whether bad in law and a nullity - Whether there had been breach of s. 28(2) of the Stamp Ordinance 1949.*

This was an application by the chargor *vide* SIC dated 6 April 1991 to set aside the order for sale and all subsequent orders made in consequence thereof on two separate grounds, that is:

(1) the statutory notice of demand in Form 16D prescribed under the Code and served by the chargee upon the chargor was, it was said, in excess of the sum for which the chargor was liable under the charge thereby rendering it bad in law and resulting in the subsequent proceedings to enforce the charge a nullity.

(2) there had been a breach of s. 28(2) of the Stamp Ordinance 1949, the effect of which was to require that each time the principal sum owing under the charge was increased either by capitalising the interest or by making further advances, it was necessary to stamp the charge proportionately, and, in consequence, there had also been a breach of s. 301(e) of the Code, which requires, *inter alia*, that an instrument (and this would include a charge) to be fit for registration had to be duly stamped in accordance with the provisions of the Stamp Ordinance.

It was therefore contended that the charge was not fit for registration within the meaning of s. 301(e) of the Code, was therefore void and so the statutory notice of demand in Form 16D and the subsequent proceedings including the order for sale were fatally flawed.

Held:

[1] Having found that the statutory notice of demand in Form 16D which had been served upon the chargor was valid and effective in law and that at the expiry of the period specified in the notice, the breach in question had not been remedied, the Court held; that the chargee was at liberty to apply for an order for sale pursuant to s. 254(3)(b) of the Code.

[2] The question for consideration was whether the chargor had shown the existence of "cause to the contrary" as required by s. 256(3) of the Code, for otherwise the Court shall order the sale of the lands.

[3] It appears that the recent judgment of the Supreme Court in the case of *United Malayan Banking Corporation v. Pekeliling Triangle Sdn. Bhd.* is precisely in point, and puts paid to the second branch of Counsel's submissions. Accordingly, the learned Judge could not hold that the chargor had failed to show the existence of cause to the contrary within the s. 256(3) of the Code.

[Chargor's application dismissed with costs.]

Case referred to:
United Malayan Banking Corpn. v. Pekeliling Triangle Sdn. Bhd. [1991] 1 CLJ (Rep) 474 ***(foll)***

Legislation referred to:
National Land Code 1965, ss. 246(1), (2), 254, (3)(b), 256, (3), 301(e)
Rules of the High Court 1980, O. 83
Stamp Ordinance 1949, s. 28(2)

For the plaintiff - Lian Siew Ling; M/s. Murad & Foo
For the 1st defendant - Mohideen Abdul Kadir; M/s. Mohideen & Asamaley
For the 2nd defendant - P.C. Choong; M/s. Choong & Co.

JUDGMENT

Edgar Joseph Jr J:

In this case, the third party chargor (the chargor) having defaulted with payment, the chargee bank (the chargee) had served upon the chargor, a notice of demand in writing in Form 16D (the Form 16D Notice) prescribed under s. 254 of the National Land Code (the Code), and commenced proceedings by originating summons to enforce the charge created on 28 May 1981, bearing Presentation Number 5917/81, Jilid 210 Folio 66 (the charge) by way of a charge action under O. 83 of the Rules of the High Court 1980, praying for, *inter alia,* an order for sale of certain lands, comprised in Lot Nos. 370, 371, 372 and 373 Seksyen 2, Bandar Batu Feringgi, Daerah Timur Laut, Pulau Pinang, held under Geran No. Pendaftaran 6770, 6771, 6772 and 6773 as appeared in the said charge bearing Perserahan No. 5917/81, Jilid No. 210 and Folio No. 66 (the lands) being the subject matter thereof, pursuant to the provisions of s. 256 of the Code.

The chargor having failed to enter an appearance and being absent although duly served, an order for sale was made on 19 July 1990 (the order for sale), no appeal being lodged against the same.

However, some 6 months later, the chargor bestirred himself for, by a summons in chambers dated 6 April 1991 later amended, he had applied to set aside the order for sale and all subsequent orders made in consequence thereof, on two separate grounds which, broadly stated, were as follows:

(1) the statutory notice of demand in Form 16D prescribed under the Code and served by the chargee upon the chargor was, it was said, in excess of the sum for which the chargor was liable under the charge thereby rendering it bad in law and resulting in the subsequent proceedings to enforce the charge a nullity.

(2) there had been a breach of s. 28(2) of the Stamp Ordinance 1949, the effect of which was to require that each time the principal sum owing under the charge was increased either by capitalising the interest or by making further advances, it was necessary to stamp the charge proportionately, and, in consequence, there had also been a breach of s. 301(e) of the Code, which requires, *inter alia,* that an instrument (and this would include a charge) to be fit for registration had to be duly stamped in accordance with the provisions of the Stamp Ordinance.

Consequently, the charge was not fit for registration within the meaning of s. 301(e) of the Code, was therefore void and so the statutory notice of demand in Form 16D and the subsequent proceedings, including the order for sale were fatally flawed.

I shall, in the course of this judgment, be considering these grounds in detail but, in the meanwhile, for a better understanding of the issues which arise for decision, it is necessary to set out shortly the facts underlying this application.

The charge had been created in favour of the chargee as security for the repayment of an overdraft facility up to a limit of only RM1,000,000 and interest at an agreed rate thereon granted to the chargor's family company Lim Kar Bee & Sons (the borrower). More particularly, at all material times, the chargor was the managing and governing director for life of the borrower as was apparent from a perusal of Clause 52 of the relevant memorandum and articles of association.

The first ground relied upon by the chargor was that in the absence of any request by him, the overdraft limit for which he had agreed to charge the lands was RM1 million and no more. But, it was said, that the chargee's alleged right to the order of sale was based on an alleged breach of covenant to repay overdraft facilities up to a limit of RM1.35 million granted pursuant to a letter of offer dated 15 June 1988, and, purportedly, pursuant to the charge. In fact, it was said, that the chargor had not made any such request nor had he consented to the further advance of RM350,000 made to the borrower under the letter of offer dated 15 June 1988. Consequently, the notice of demand in Form 16D had required payment of a sum in excess of the sum for which the chargor was liable under the charge, thereby rendering it invalid and all subsequent proceedings based thereon a nullity.

It was accepted on both sides that at the time of the issue of the chargee's notice of demand in Form 16 addressed to the chargor, the overdraft limit stood at RM1,350,000 due to increase in the limit in two stages, that is to say:

(a) an increase of RM200,000, from RM1,000,000 to RM1,200,000, and

(b) an increase of RM150,000, from RM1,200,000 to RM1,350,000

The circumstances surrounding the increase from the overdraft limit of RM1,000,000 to RM1,200,000 were these:

By a letter dated 25 March 1986, being Encl. 37 Ex.A addressed to the chargee, the chargor had specifically requested this increase to be repaid within two months after utilisation.

This increased limit had been utilised by the borrower during the period from March to May 1986. However, the advances of principal had never exceeded the limit of RM200,000 - a fact upon which much stress had been placed by Counsel for the chargee.

As to the interest - this had been accruing at the rate of 14% (3.25% + Base Lending Rate of 10.75%) p.a. on monthly rests on RM1,200,000 and at the then excess rate of 17.5% (6.75% + Base Lending Rate of 10.75%) p.a. on monthly rests on sums in excess of RM1,200,000.

In order to formalise, the chargor's specific request for the increase in the overdraft limit from RM1,000,000 to RM1,200,000, the chargee had issued a letter of offer dated 18 April 1986 being Ex. B to encl. 37, for the additional facilities which had been duly accepted.

Between the period June 1986 until June 1988, there had been no withdrawal on the account except for RM50 in December 1987.

As at 31 May 1988, the overdraft account had stood at RM1,456,939.79; exceeding the overdraft limit due only to interest of more than RM256,939.79 which had accrued.

The increased limit of RM200,000 was to have been repaid within two month's but was not. Indeed, not even the monthly interest accruing was paid.

The position as at 31 May 1988, was that the overdraft account stood at RM1,456,939.88; but the principal advanced had never exceeded RM1,200,000 and more than RM256,939.79 represented accumulated capitalised interest. In this context, it is pertinent to refer to the Anexure to the charge, Clause 5 of which provides that for purposes of ascertaining whether the limit of principal has been exceeded or not all accumulated interest shall be deemed to be interest and not principal.

Also, pertinent is Clause 4 of the Annexure to the charge which provides that accumulated and capitalised interest shall be secured by the charge.

Accordingly, it was clear beyond argument that the aforesaid sums of RM1,456,939.79 had been already secured under the charge.

I next turn to consider the circumstances surrounding the increase in the overdraft limit from RM1,200,000 to RM1,350,000.

The borrower had made this request for an increase in the overdraft limit from RM1,200,000 to RM1,350,000 in order to reduce interest that was accruing but was not being paid.

If the limit had remained at RM1,200,000, the excess rate of interest would have been charged on sums in excess RM1,200,000; that is to say, RM256,939.79 (RM1,456,939.79 - RM1,200,000). The effect of the limit being increased to RM1,350,000 was that the excess rate of interest was being charged on sums in excess of RM1,350,000. In this case, the sums in excess of RM1,350,000, amounted to RM106,939.79 (RM1,456,939.79 - RM1,350,000) only. Thus, the effect of the increase in the overdraft limit, was that interest accruing due was considerably less and so to the advantage of the borrower.

On the question whether the consent of the chargor was required for this increase in the overdraft limit from RM1,200,000 to RM1,350,000, it seemed obvious to me that such consent was not required since by thus increasing the overdraft limit the chargee had not advanced to the borrower a further sum of RM150,000 (RM1,350,000 - RM1,200,000) not yet secured by the charge. In other words, by thus increasing the overdraft limit, the chargor's liability under the charge had not been increased since RM1,456,939.79 had been already secured under the charge by virtue of Clause 4 of the Annexure to the charge.

If, contrary to my primary view, the consent of the chargor was required by reason of Clause 7 which does not specify the form consent, then such consent need not be in writing by virtue of the Annexure to the charge.

In the circumstances, I would agree with the alternative submission of Counsel for the chargee that if the consent of the chargor was required under Clause 7 of the Annexure to the charge, then such consent could be reasonably inferred from the fact at all material times the chargor was and still is the managing director and governing director of the borrower company and the further fact that there had been inaction and delay on his part in raising the objection of absence of consent.

Accordingly, the first ground of defence that the statutory notice of demand in Form 16D which had been served upon the chargor, was in excess of the sum for which the chargor was liable under the charge and therefore invalid, failed.

The second ground relied upon by the chargor was that there had been non-compliance with the requirements of s. 28(2) of the Stamp Ordinance 1949, which reads as follows:

> Where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty stamped thereon extends to cover; but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument bearing date on the day on which the advance or loan is made.

It was pointed out that although Clause 7 of the Annexure to the charge enabled the chargee to advance further sums to the chargor beyond the RM1 million overdraft limit, it was not open to the chargee to do so in violation of the requirements of s. 28(2) of the Stamp Ordinance. Consequently, each time the principal sum was increased it was necessary to stamp the charge proportionately since a charge is an enforceable security for only the sum for which the stamp duty covers.

It was emphasised that the charge in this case had been stamped to cover only the principal sum of RM1 million and not the principal sum RM1.35 million and interest. It was said therefore that on the dates when the notice of demand in Form 16D had been issued, the charge was an enforceable security for repayment of only the principal sum of RM1 million and so the chargee was precluded from enforcing the charge as a security for the repayment of a principal sum in excess of RM1 million.

The second ground relied upon by the chargor flows from the first ground and it would be convenient if I now proceeded to refer to Counsel for the chargor's submission thereon.

It was pointed out that registration of dealings under the Code fell to be considered under Part 18 thereof. In particular, a charge to be registrable under the Code had to comply with the requirements of Chapter 1 of Part 18 thereof and, by s. 301 thereof, an instrument shall be fit for registration only if it is stamped in accordance with the provisions of the Stamp Ordinance. This, said Counsel, leads to a consideration of s. 28(2) of the Stamp Ordinance, the effect of which is that a security is to be available for enforcement for such amount only as the *ad valorem* duty stamped thereon covers. So, where an advance or loan is made in excess of the amount covered by that duty the security shall, for purposes of stamp duty, be deemed to be a new and separate instrument.

With the above principles in mind, Counsel then draw my attention to the particular circumstances of this case.

The charge had been registered on 1 June 1981, to secure repayment of a sum of RM1 million together with interest thereon and had been stamped with *ad valorem* duty for the same amount.

When, therefore, said Counsel, the chargee had on 15 June 1988, made a purported advance of RM350,000 in excess of the RM1 million limit, the charge had to be deemed, for purposes of stamp duty, to be a new and separate instrument with effect from that date.

Accordingly, as a charge to be registrable under the Code had to be duly stamped in accordance with the requirements of the Stamp Ordinance, there was no registrable charge executed by the chargor in favour of the chargee under the Code for the payment of RM1.35 million together with interest thereon.

The logical conclusion of this argument was that the chargee's remedy of sale of the charged land under Chapter 3 of the Code would be only available in respect of a charge registrable under the Code. Since, upon the facts, there was no charge registrable under the Code to secure payment by the chargor of the RM1.35 million and interest thereon, the remedy of sale of the charged land was not available to the chargee.

Furthermore, to successfully enforce the charge the first step the chargee would have to take would be to issue the statutory notice of demand in Form 16D specifying therein the breach under the charge, that is to say, default in the payment of the sum covered by the charge and calling upon the chargor to remedy the same within the time stipulated therein. It follows that when, as here, a statutory notice alleging default in the payment of a sum was not covered by the charge, it would be bad in law.

Having initiated proceedings for the remedy of sale of the lands under Chapter 3 Part 16 on the basis of a charge to enforce payment of an unsecured sum of RM1.35 million together with interest, the chargee may not ask the Court to amend the amount referred to in para. 1 of the order for sale said to be owing to it, to a lesser sum.

The proper course for the chargee to take if it wishes to invoke the remedy of sale under Chapter 3 Part 16 in respect of the charge, would be to commence proceedings afresh by issuing the relevant statutory notices specifying the amount due to the chargee and the breaches by the chargor.

In winding up this branch of his arguments, Counsel submitted that although subsections (1) and (2) of s. 246 of the Code provide for the making of further advances to rank in priority to any subsequent charge of the same land, they do not dispense with the need to comply with s. 301(e) of the Code and s. 28(2) of the Stamp Ordinance.

Having found that the statutory notice of demand in Form 16D which had been served upon the chargor was valid and effective in law and that at the expiry of the period specified in the notice the breach in question had not been remedied, I must hold that the chargee was at liberty to apply for an order for sale pursuant to s. 254(3)(b) of the Code.

The next question for consideration is whether the chargor has shown the existence of "cause to the contrary" as required by s. 256(3) of the Code, for otherwise the Court shall order the sale of the lands.

The second branch of Counsel for the chargor's submission alleging a contravention of s. 28(2) of the Stamp Ordinance 1949 and s. 301 of the Code, flows from the first branch of his submissions based on the alleged invalidity of the notice of demand in Form 16D and it seems to me that having failed with the former he must inevitably fail with the latter. But, quite apart from that, it appears to me that the recent judgment of the Supreme Court in the case of *United Malayan Banking Corpn. v. Pekeliling Triangle Sdn. Bhd.* (Civil Appeal No. 381/90) see [1991] 1 CLJ (Rep) 474 is precisely in point, and puts paid to the second branch of Counsel's submissions.

Accordingly, I could not but hold that the chargor had failed to show the existence of cause to the contrary within s. 256(3) of the Code, and so the chargor's application to set aside the order for sale was dismissed with costs.

Also found at [1992] 2 CLJ 1192